

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 345 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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DHIRAJLAL VANMALIDAS THAKKER

Versus

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Appearance:

Shri Y.S.Lakhani, Advocate, for the appellant - complainant (Amicus curiae).

Shri K.R.Raval, Advocate, for Shri A.D.Shah, Advocate, for Respondent No.1 - accused.

Shri S.T.Mehta, Additional Public Prosecutor, for Respondent No.2 - State.

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 08/11/96

ORAL JUDGEMENT

The appellant - complainant has invoked the appellate jurisdiction of this court under Section 378 (4) of the Code of Criminal Procedure, 1973 (the Cr.PC for brief) for questioning the correctness of the judgment and order of acquittal passed by the learned Metropolitan Magistrate of Court No.13 at Ahmedabad on 30th September 1980 in Criminal Case No.1392 of 1978. Thereby the learned trial Magistrate acquitted respondent No.1 - accused of the offences punishable under Sections 324 and 323 of the Indian Penal Code, 1860 (the IPC for brief).

2. The facts giving rise to this appeal move in a narrow compass. It is the complainant's case that he was at his hotel on 17th October 1978 and his servant informed him that his wife was being beaten by one Dayabhai, his wife and his daughter at about 3.30 p.m. on that day. He thereupon went to the spot and tried to intervene and rescue his wife but in the process Dayabhai slapped him twice. In the meantime, according to the complainant, the police mobile van arrived on the scene and took away both Dayabhai and the complainant. The complainant was kept in the police lock-up as he was stated to have been found by the police in a drunken state. According to the complainant, he was not released on bail though an attempt was made to get him released on bail in the late evening on that very day. He was released on bail the next day at about 11.30 a.m. on the surety given by one Ramanlal in the sum of Rs.750. It is the case of the complainant that during his police lock-up he was severely beaten mainly by respondent No.1 - accused with stick and he was also given burn patches in his left palm and on the dorsal of his right hand with cigarette butts. He is reported to have given this information to his brother-in-law, named, Hasmukhbhai, and his companion Natwarlal when he was released on bail. They thought of seeking some advice. So the complainant is stated to have approached one Municipal Corporator Jivandas Damani. He was found sitting with another Municipal Corporator Rohit Patel. It is the case of the complainant that he was advised to go to the Police Commissioner's office and he was given a chit on the Police Commissioner. Apropos, he in the company of his brother-in-law and his friend went to the Police Commissioner's office. His complaint was recorded thereat on 18th October 1978. It appears that six days later he filed his complaint of the incident before the Metropolitan Magistrate of Court No.13 at Ahmedabad on 24th October 1978 charging respondent No.1 - accused with the offences punishable under Sections 324, 323 and 114

of the IPC. It came to be registered as Criminal Case No.1392 of 1978. On issue of process, respondent No.1 accused appeared. The charge against him was framed on 13th September 1979. Respondent No.1 - accused did not plead guilty to the charge. He was thereupon tried. After recording the evidence on the side of the complainant and after recording the further statement of respondent No.1 - accused under Section 313 of the Cr.PC and after hearing arguments, by his judgment and order passed on 30th September 1980 in Criminal Case No.1392 of 1978, the learned Metropolitan Magistrate of Court No.13 at Ahmedabad acquitted respondent No.1 - accused of the offences punishable under Sections 324 and 323 of the Cr.PC. That aggrieved the original complainant. He thereupon invoked the appellate jurisdiction of this court under Section 378 (4) of the Cr.PC for questioning its correctness.

3. At the time this appeal was taken up for hearing, it was found that the appellant did not respond to the notice served to him as his former advocate came to be elevated. Thereupon, this court thought it fit to appoint learned Advocate Shri Y.S.Lakhani to represent the appellant - complainant in this appeal. It appears that, in the meantime, the appellant's son appears to have made some inquiry about this appeal in this court and he was informed that learned Advocate Shri Lakhani was appointed on behalf of the appellant to assist this court in this appeal. At that stage, learned Advocate Shri Lakhani gathered information about the death of the original appellant during the pendency of this appeal and it was so reported to this court. It is however a settled principle of law that the death of the appellant - complainant would not result in abatement of his appeal and the fate of his appeal has to be decided on its own merits in view of the binding ruling of the Supreme Court in the case of KHEDU MOHTON v. STATE OF BIHAR reported in AIR 1971 Supreme Court at page 66. In that view of the matter, I have again thought it fit to avail of services of learned Advocate Shri Lakhani to assist this court for the purpose of this appeal though the original appellant was no longer alive.

4. Learned Advocate Shri Lakhani has taken me through the entire evidence on record in support of his submission that the learned trial Magistrate was not right in acquitting respondent No.1 - accused of the offences with which he stood charged. According to learned Advocate Shri Lakhani, the learned trial Magistrate ought to have come to the conclusion that the

complainant's case was established at trial beyond any reasonable doubt. Learned Additional Public Prosecutor Shri Mehta for respondent No.2 - State has supported learned Advocate Shri Lakhani in this matter. As against this, learned Advocate Shri Raval for respondent No.1 - accused has submitted that the learned trial Magistrate has carefully examined and appreciated the evidence on record and has come to the conclusion that no case against respondent No.1 - accused was proved beyond any reasonable doubt. It has been urged by learned Advocate Shri Raval for respondent No.1 - accused that the view taken by the learned trial Magistrate is a possible view and, according to well settled principles of law governing acquittal appeals, this court need not interfere with the judgment and order of acquittal under challenge in this appeal.

5. It is not necessary to reiterate or repeat the complainant's case as stated by him in his oral testimony at Exh.2 on the record of the case. It is full of contradictions qua his complaint before the police and also qua his complaint before the court. The theory of burn patches specified in the complaint before the court has not figured in his complaint before the police at Exh.4 on the record of the case. This omission he has tried to explain at trial by saying that he objected to such omission at the time of recording of his complaint at Exh.4 on the record of the case by the police. There is no material on record to corroborate that oral version of his. He does not appear to have lodged any protest in that regard before any authority though he has stated that he went to the Police Commissioner's office at the instance of Municipal Corporators Shri Jivandas Damani and Shri Rohit Patel. The learned trial Magistrate has rightly doubted the version of the complainant as to inflicting of burn patches in his left palm and on the dorsal of his right hand on account of this material omission in his police complaint.

6. It is the complainant's case that he went to the Police Commissioner's office at the instance of the then Municipal Corporators Shri Jivandas Damani and Shri Rohit Patel. Neither of them has supported the complainant's case at trial. In fact, Jivandas Damani has been examined at Exh.8 on the record of the case. He did not support the complainant's case. He was declared hostile. Nothing material could be elicited from him in his cross-examination at the instance of the complainant. Another Municipal Corporator at the relevant time Rohit Patel has been examined as the witness of the complainant at Exh.20 on the record of the case. He has also not

supported the complainant's case at trial. Strangely enough, he was not declared hostile by or on behalf of the complainant. It thus becomes clear that the material witnesses examined to support the case of the complainant at trial have, in fact, not supported his case. No other witnesses have supported the complainant's case at trial. The complainant's version appearing in the oral testimony at Exh.2 on the record of the case remained uncorroborated. The learned trial Magistrate has found it not worthy of credence or credit on account of the fact that he was convicted twice for violation of the law relating to prohibition as prevalent in Gujarat and three prohibition cases were pending against him at the relevant time. It would thus mean that he might be bearing grievance and/or grudge against the police for hooking him for breach of the law relating to prohibition prevalent in the State. He can thus be said to be an interested witness. In absence of any corroboration, the learned trial Magistrate has rightly chosen not to rely on his evidence. Apart from his interested version in the matter, contradictions found in his evidence were also quite glaring as found by the learned trial Magistrate. In that view of the matter, there is no escape from the conclusion that the view taken by the learned trial Magistrate on the basis of the evidence on record is a possible view. The impugned judgment and order of acquittal therefore calls for no interference by this court in this appeal in accordance with settled principles of law governing acquittal appeals.

7. Before parting with this judgment, I will fail in my duty if I do not record the note of appreciation of valuable assistance rendered by learned Advocate Shri Lakhani as amicus curiae. He seems to have taken pains on going through the entire record very carefully and has tried his best to convince me that the view taken by the learned trial Magistrate was not correct.

8. In the result, this appeal fails. It is hereby dismissed.

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